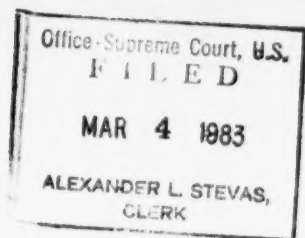


82-1467



NO.

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 1983

CARL FROST,

PETITIONER

V

UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

CHARLES L. HOWARD, III
HOWARD & HOWARD
1033 Frank Nelson Building
Birmingham, Alabama 35203
Telephone: (205) 251-5138
Attorney for Petitioner

QUESTION PRESENTED

Whether the petitioner, Carl Frost, was denied the right of due process and the right against self incrimination under the Fifth Amendment and the right to a fair trial and confrontation of witnesses under the Sixth Amendment of the Constitution of the United States where the Trial Court admitted portions of an alleged confession of Carl Frost on direct examination of Government witness, FBI Agent Richard Beerman, and excluded on cross examination of Agent Beerman, other portions of the same confession containing exculpatory statements of Carl Frost, on the grounds that the statements sought were outside the scope of direct examination.

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PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

To the Honorable, the Chief Justice and
Associate Justices of the Supreme Court of the
United States:

Carl Frost, the Petitioner herein, prays that
a Writ of Certiorari issue to review the judgment
of the United States Court of Appeals for the
Eleventh Circuit entered in the above-entitled
case on December 28, 1982.

OPINIONS BELOW

The United States Court of Appeals for the Eleventh Circuit, whose judgment is herein sought to be reviewed, affirmed the judgment of the United States District Court for the Northern District of Alabama without opinion on December 28, 1982, which judgment is unreported and printed in Appendix A hereto, *infra*, page, A-1. A timely petition for rehearing of the judgement of the United States Court of Appeals for the Eleventh Circuit was denied on February 25, 1983, which judgment is printed in Appendix A hereto, *infra*, page A-2.

JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 USC 1254(1).

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

This case involves the Fifth and Sixth Amendments to the Constitution of the United States, and Rule 611(b), Federal Rules of Evidence, which provide as follows:

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

RULE 611 (b) FRE

SCOPE OF CROSS-EXAMINATION.

Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

STATEMENT OF THE CASE

This is a prosecution for violation of 18 USC 2312. Carl Frost was charged along with seven other defendants in the violation of this section by the transportation of a 1978 Caterpillar 955 L Front End Loader from Jefferson County, Alabama, to Conroe, Texas. Trial commenced on February 4, 1982, before Honorable E. B. Haltom, District Judge.

The Government called FBI Agent Richard Beerman as a witness and questioned him regarding an interview with Carl Frost in June of 1980, some 16 months prior to the trial of this case. Immediately an objection was raised on behalf of the other defendants based upon Bruton v United States, 88 S.Ct. 1620, 391 U.S. 123, 20 L.ed 2d 476. Outside the presence of the jury, the examination of Mr. Beerman was continued by the court. The Government elicited testimony seriously implicating more than one of the other defendants in acts which could be construed as a

part of the offense charged in the indictment. The Government took the position that defendant Henry Wayne Woods could be effectively protected by special instruction from the Court. The Government, however, did not oppose a severance on the motion of defendant Henry Wayne Woods and on February 9, 1982, the Motion for Mistrial and Severance of Henry Wayne Woods was granted. A Motion for Severance by defendant Carl Frost was overruled. A motion by the defendant Walter Davis Bullock, for severance, based upon incriminating references to him in the statement of Carl Frost and references to a check, was overruled by the court. The jury was instructed that Henry Wayne Woods was no longer a defendant and the trial proceeded with further examination of the witness Beerman in the presence of the jury.

The testimony then elicited from the statement of Carl Frost through this witness detailed the acquisition of the front end loader

and its transportation to the Southern Equipment Company, in Birmingham, Jefferson County, Alabama, by Carl Frost, Henry Wayne Woods, and Henry Frost. The direct examination terminated with the delivery of the loader to Southern Equipment Company. This was not the termination of the statement itself.

On cross examination by counsel for Carl Frost, Beerman was asked about a subsequent meeting at the airport in Birmingham, Alabama. The omitted part of the statement which was excluded by the trial court proved that Carl Frost had gone to the airport with defendant, Henry Wayne Woods, to meet with the Bullocks. Walter Bullock and his wife were returning from Texas after having sold the front end loader. Carl Frost told Beerman he went with Henry Wayne Woods to collect money which was owed to Woods. He also stated that while at the airport, having already moved the loader to Southern Equipment Company, he then found out that it was stolen.

An objection was raised by counsel for Walter Bullock. Upon direct inquiry by the Court, the Government took the position that the matter inquired into on cross examination, being the subsequent meeting at the airport when one of the co-defendants was returning from Texas after the sale of the machine, was beyond the scope of direct examination, and in addition, was hearsay to the Government. The trial court ruled this matter was outside the scope of direct examination and refused to permit further inquiry. An exception was taken to this ruling on behalf of Carl Frost. The trial continued to conclusion with the jury never hearing the entire statement made by Carl Frost to Agent Beerman. Henry Frost was acquitted. All other defendants remaining on trial, including Carl Frost were found guilty.

The statement of Carl Frost was examined by the court, incamera, and sealed to be made a part of the record.

REASONS FOR GRANTING THE WRIT

This Writ should be granted in order to direct specific attention to the conflict between the basic Constitutional Rights provided by the Fifth and Sixth Amendments and Rule 611(b), of the Federal Rules of Evidence. It is clear that proper application of Rule 611(b) will result in orderly trial procedure, a limiting of unnecessary confusion, and promote Judicial economy. A mechanical application of this Rule will also result in the absolute denial of guaranteed Constitutional Rights.

The law regarding the admissibility of confessions is unquestionably well settled. In 29 Am Jur 2d, Evidence §535 the general rule with numerous citations is set out as follows:

What the accused said upon the subject at the time of making the confession is admissible and should be taken together; and if the prosecution fails to prove the whole statement, the accused is entitled to put in evidence all that was said to and by him at the time which bears upon

the subject of controversy, including any exculpatory or self-serving declarations connected therewith. It is for the jury to say what weight shall be given to the several parts of the statement, for they may well believe that part which charges the defendant, and reject that which tends to exculpate him. To be admissible, however, it must clearly appear that the exculpatory statements were made in the same confession or conversation sought to be introduced in evidence, and not upon other or separate occasions.

There are a number of considerations pointed out by the author in the above cited reference work which in the instant case have all been met. The record will show that there can be no dispute that the exculpatory matter sought to be introduced by Carl Frost was made at the same time and a part of the statement introduced against him by the Government. The text also states that parts of the confession having no reference to the issue upon trial are not admissible under the rule entitling the defendant to present the entire confession. This is not the case here, in fact, the material sought to be

brought before the jury in cross examination was an inseperable part of the entire statement.

It is also well settled that an incomplete or interrupted confession is not admissible. There is no showing by statement of the Government counsel or evidence that there was any interruption in the interview with Agent Beerman, that the same was not concluded, or that some part which the defendant sought to elicit from the witness was made at a different time and place unconnected to the Government's admitted portions.

The reasoning is clear in regard to consideration of exculpatory statements. In United States v Wenzel, 311 F.2d 164 (CA4 1962), the court speaking to the specific instance wherein a confession is interrupted states at 168:

As an outgrowth of this and founded on the same reasoning it has been held improper to admit a confession which, after admitting the commission of the criminal act, is interrupted thereby preventing the defendant

from adding anything which might explain the reason for his conduct or serve to condone it...

In both of the cases the courts held the confessions inadmissible on the ground that the accused had been prevented from adding anything that might have exculpated him or lessen the gravity of his act. Obviously the rule which frowns upon incomplete confessions is designed where an accused, after admitting commission of the criminal act, is prevented from going further and saying anything which might explain or justify his act.

Where a voluntary statement is sought to be used against a defendant, in the nature of a confession, it is a fallacy to apply mechanically, Rule 611(b), of the Rules of Evidence which then, in fact, allows the Government to engage in conduct which long and well settled law condemns. In the event that a portion of the confession, although being a part and parcel of the matter at issue, is

inadmissible, the entire confession is inadmissible for any purpose. Long standing authority upon this question is collected in 2 ALR 1014, supplemented in 26 ALR 537.

The record herein will reflect clearly that judicial expediency took precedence over Constitutional rights. After addressing the question and summarily dismissing the protests of counsel for Carl Frost the court then reflects upon the ruling based solely on scope of the direct examination by stating:

"Well, I am trying to protect the rights of all of the defendants. That is my ruling."

The court had, in fact, recognized that the proper handling of this matter would have involved the granting of a severance motion on behalf of Carl Frost and thereby omitted whatever prejudice to other defendants resulted from a Bruton, supra, problem caused by the Governments use of the statement. Faced with the ultimate decision of either denying

defendant, Carl Frost, the right to present the exculpatory material in his statement or continuing the trial, retaining the presence of all remaining defendants, the court chose to continue the trial. Judicial economy can never excuse the denial of Constitutional rights to one defendant in the trial of a case because those rights interfere with the trial of other defendants charged with him. Carl Frost was undeniably prejudiced by the presentation through his statement of admitted participation in movement of the front end loader to a place from whence it was later transported to Texas and sold by another defendant. However, had he been allowed to prove the excluded portion of his statement, the jury could believe that he in fact knew nothing about a theft until the equipment had already been transported and sold and that he had acted only as an ordinary contractor for the movement of heavy equipment, and this activity was confined to Jefferson County, Alabama. A

conclusion could be reached that he was innocent of any wrong doing. However, the Government was allowed, by the Court's ruling, based upon scope of the direct examination, to place the defendant in the very position condemned by all of the authority cited in this petition. The circumstances were no different than would have existed if Carl Frost had been interrupted before he was able to make the statement regarding the airport meeting. In the event this interruption was a fact the confession would be inadmissible. Where the entire confession is one uninterrupted statement, complete, the defendant, against whom the statement is used as a confession has the right to offer all exculpatory portions of it.

The trial court in this case has denied defendant, Carl Frost, his Constitutional rights not to be compelled to be a witness against himself, nor to be deprived of due process, and has denied him the right of confrontation of

witnesses against him. The denial of these rights has been accomplished by a mechanical and improper application of Rule 611(b), Federal Rules of Evidence.

The discretion granted to the trial court in Rule 611(b), Federal Rules of Evidence cannot under the most liberal construction allow disregard of long standing legal precedent. The record herein reflects a serious abuse of the discretion allowed under Rule 611(b). Mechanical application of this rule will trample constitutional guarantees. The rule must be applied in order to recognize the individual defendant's right to offer any explanatory matter in a statement which he has made on the subject in issue. In a multiple defendant case, where Bruton problems arise directly from the defendant's efforts to place the exculpatory matter before the jury, the circumstances demand a severance. To do otherwise is to effectively deny the defendant whose statement is used every constitutional right cited in this petition.

CONCLUSION

The conflict between the application of procedural rule 611(b) of the Federal Rules of Evidence and the Fifth and Sixth Amendments to the Constitution of the United States must be spoken to by this Court in order that a clear statement of the boundaries of the judicial discretion available under the rule be made clear as regards exculpatory statements of a defendant in a confession used by the prosecution in it's case in chief against him.

The petition for a Writ of Certorari should be granted.

Respectfully submitted,

HOWARD & HOWARD

BY: _____

Charles L. Howard, III
1033 Frank Nelson Bldg.
Birmingham, Al 35203
Telephone: (205)251-5138
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Petition for Writ of Certorari upon Honorable Holly Wiseman, AUSA, by delivering a copy of same to her office, 200 Federal Courthouse, Birmingham, Alabama 35203, on this the _____ day of March, 1983.

Charles L. Howard, III
1033 Frank Nelson Bldg.
Birmingham, Al 35203
Telephone: (205) 251-5138
Attorney for Petitioner

A-1

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 82-7051
Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WALTER DAVIS BULLOCK,
CARL FROST, JOHN EDGAR LOVELL,

Defendants-Appellants

Appeal from the United States District
Court for the Northern District of Alabama

(December 28, 1982)

BEFORE GODBOLD, Chief Judge, FAY and CLARK,
Circuit Judges.

PER CURIAM:

AFFIRMED. See Circuit Rule 25.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-7051

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WALTER DAVIS BULLOCK,
CARL FROST, JOHN EDGAR LOVELL

Defendants-Appellants

Appeal from the United States District Court
for the Northern District of Alabama

IN PETITION FOR REHEARING

(On February 25, 1983)

Before GODBOLD, Chief Judge, Fay and Clark,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby denied.

ENTERED FOR THE COURT:

/s/ Peter Fay

United States Circuit Judge